

[2013] NZCOP 16

COP 006/13

**UNDER**

The Copyright Act 1994

**BETWEEN**

**RECORDING INDUSTRY  
ASSOCIATION OF NEW ZEALAND**

Applicant

**AND**

**CAL2013-E000737**

Respondent

**BEFORE THE COPYRIGHT TRIBUNAL**

Jane Glover

**DECISION ON THE PAPERS**

***Introduction***

[1] This case concerns alleged file sharing infringement under s.122A-U of the Copyright Act 1994 (“the Act”).<sup>1</sup> Sections 122A-U of the Act set out a process for copyright owners to use when they consider that an internet user has infringed their copyright via a file sharing network. File sharing is defined in s.122A as follows:

*“File sharing is where -*

- (a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and*
- (b) uploading and downloading may, but need not, occur at the same time.”*

[2] File sharing networks are not illegal in themselves, although much of the content on file sharing networks is music, film, television, books or software that is protected by the Copyright Act 1994. When a rights owner alleges that its copyright has been infringed via file sharing, the Act provides that the rights owner may require the relevant internet protocol address provider (IPAP) to issue infringement notices to the account holder concerned. The first infringement notice is a detection notice, the second is a warning notice, and the third is an enforcement notice. After an enforcement notice has been issued, the rights owner may apply to the Copyright Tribunal for an order under s.122O of the Act that the account holder pay to it a sum of money, calculated in accordance with the Copyright (Infringing File Sharing) Regulations 2011 (“the Regulations”).

[3] This case concerns an application for an order for payment under s.122O.

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<sup>1</sup> Sections 122A-U were inserted into the Copyright Act 1994 by the Copyright (Infringing File Sharing) Amendment Act 2011.

## **Parties**

[4] The Applicant is the Recording Industry Association of New Zealand (RIANZ). RIANZ filed its application to the Tribunal in its capacity as agent for the copyright owners, The David Geffen Company/Interscope Records (Universal Music New Zealand Limited) and Universal Island Records Limited (Universal Music New Zealand Limited).

[5] The Respondent is an individual internet account holder.

## **Factual background and procedural history**

[6] This case involves the alleged uploading of the sound recording *Back to Black* by Amy Winehouse on 11 September 2012 and again on 12 November 2012, and the alleged uploading of the sound recording *Jesus Piece* by The Game on 4 February 2013. These three alleged infringements triggered the following infringement notices:

- [a] an initial detection notice, issued on 18 September 2012;
- [b] a warning notice, issued on 19 November 2012; and
- [c] an enforcement notice, issued on 18 February 2013.

[7] The Application, together with detailed submissions and an authorisation of agent form, was filed with the Tribunal on 22 March 2013. The Applicant sought an award of \$543.42, including a deterrent sum of \$250.

[8] On 10 April 2013, the Tribunal wrote to the Respondent, sending to him a copy of the Application and a Notice of Proceedings. The Notice of Proceedings included the following paragraphs:

- [a] *Under section 122K(2) of the Act, the Applicant alleges that the Respondent has committed the file sharing infringements, as set out in **Attachment A**, and now applies to the Copyright Tribunal to award the amount of \$543.42 to the Applicant.*
- [b] *You have 10 working days to respond. If you do not respond by 24<sup>th</sup> April 2013, the Tribunal may make its decision based only on the application.*

[9] No response was received within the relevant time frame, and on 26 April 2013 the Tribunal advised the Applicant accordingly. On 29 April 2013, however, five days out of time, the Respondent sent an email to the Tribunal as follows:

*"I know my date has gone by. I just want to say I take full responsibility as the account holder. there are some music that I have never heard of? there are a lot of devices in this house hold, but if charges needed ill can pay it weekly, because im not working, and im a current student."*

[10] The Applicant has requested that as the time period for a response had expired, the email dated 29 April 2013 should not be considered by the Tribunal. The Tribunal accepts this, particularly as there was no reason given for the delay.

[11] Neither party has requested a hearing, and the Tribunal does not consider it necessary to convene one. Accordingly, this matter is determined on the papers (excluding the email dated 29 April 2013).

### ***Infringement***

[12] Infringement is defined as “an incidence of file sharing that involves the infringement of copyright in a work by a user”.<sup>2</sup> The Applicant has provided evidence that on three separate occasions the account holder or a person using the account holder’s IP address uploaded one copyright protected track, i.e. the sound recordings *Back to Black* (twice) and *Jesus Piece*. Each of the infringements occurred at an IP address of the account holder as verified by the IPAP.

[13] The Act creates a presumption that each incidence of file sharing identified in an infringement notice constitutes an infringement of the right owner’s copyright in the work identified.<sup>3</sup> An account holder may submit evidence that this presumption does not apply, or give reasons why it should not apply.<sup>4</sup> In this case, the Respondent has not provided any evidence that the presumption should not apply.

[14] In the circumstances, the Tribunal is satisfied that:

- [a] each of the alleged infringements that triggered the notices amounted to an infringement of the right owner’s copyright;<sup>5</sup> and
- [b] the infringements occurred at the IP address of the account holder.<sup>6</sup>

[15] Further, in the absence of any evidence to the contrary, the Tribunal accepts that the three infringement notices were issued in accordance with the Act.<sup>7</sup> In this regard, the Tribunal notes s.122N(1)(b) and (c), which create statutory presumptions that the information recorded in an infringement notice is correct and that the notice was issued in accordance with the Act.

### ***Penalties***

[16] The Tribunal has jurisdiction to require the Respondent to pay various sums to the Applicant under four different heads of relief:

- [a] regulation 12(2)(a), which deals with the cost of purchasing the works legally;<sup>8</sup>
- [b] regulation 12(2)(b), which provides for a contribution towards the fees paid by the rights owner to the IPAP;<sup>9</sup>
- [c] regulation 12(2)(c), which provides for reimbursement of the application fee paid by the rights owner to the Tribunal;<sup>10</sup> and

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<sup>2</sup> Section 122A(1).

<sup>3</sup> Section 122N(1)(a).

<sup>4</sup> See s. 122N(2).

<sup>5</sup> See s.122O(1)(a)(i).

<sup>6</sup> See s.122O(1)(a)(ii).

<sup>7</sup> Section 122O(1)(b).

<sup>8</sup> See also s.122O(1) and (2).

<sup>9</sup> See also s.122O(1)(3)(a).

<sup>10</sup> See also s.122O(3)(b).



### **Regulation 12(2)(d)**

[25] Regulation 12(2)(d) requires the Tribunal to determine “an amount that the Tribunal considers appropriate as a deterrent against further infringing”. In considering whether to award a deterrent sum and, if so, what that amount should be, the Tribunal may consider “any circumstances it considers relevant”, but also:

- [a] the flagrancy of the infringement;
- [b] the possible effect of the infringing activity on the market for the work; and
- [c] whether the other sums awarded by the Tribunal would already constitute a sufficient deterrent against further infringing.

[26] In this case, the Applicant alleges that the actions of the Respondent were calculated and deliberate, as evidenced by the three instances of uploading over a period of almost five months. It also states that music piracy has contributed to a halving of recorded music sales in New Zealand since 2002 (including both physical and digital works). It also submits that the sums available under sub-clauses 2(a) – (c) are modest and would not be a sufficient deterrent:

*“This is a modest sum which, in the context of this account holder’s (or a person using the account holder’s IP address) use of P2P file sharing software to make tracks available, will not likely operate on its own as a deterrent. It does not even fully reimburse the rights owners’ out-of-pocket costs...The intention of the Legislature in providing for a deterrent sum is to act not just as a deterrent for this account holder but to speak to others, i.e. the 770,000 people per month in New Zealand accessing unlicensed P2P services. For there to be a deterrent effect, there should be an extra sum which deters the infringer as well as others in the market from engaging in similar activity.*

[27] The Tribunal accepts that the activities of the Respondent are likely to have had a detrimental effect on the market for the copyright works. It also accepts that the sums awarded under sub-clauses (a) - (c) would not constitute a sufficient deterrent, and that a further deterrent sum is appropriate.

[28] In its submissions, the Applicant states that a sum of \$250 per infringement is warranted, i.e. \$750. However, in its Application, the Applicant sought only a total of \$250 under r.12(2)(d). In fairness to the Respondent, in the circumstances of this case the Tribunal cannot order him to pay a sum higher than that sought in the Application form. If, for example, it had been made clearer that the Applicant was seeking an additional \$500, the Respondent may well have elected to take additional steps in these proceedings.

[29] Taking into account all of these factors, Tribunal orders the Respondent to pay to the Applicant the sum of \$250. For the avoidance of doubt, the Tribunal confirms that had the Application specified a deterrent sum of \$750 (i.e. the sum referred to in the submissions), the Tribunal would have awarded a higher amount, although not the full \$750 sought.

### **Orders**

[30] In summary, therefore, the Tribunal orders the Respondent to pay to the Applicant the sum of \$507.17, comprised as follows:

- [a] \$7.17 under r.12(2)(a), representing the cost of purchasing the work legally;
- [b] \$50.00 under r.12(2)(b), representing a contribution towards the IPAP fees paid by the Applicant; and
- [c] \$200.00 under r.12(2)(c), being reimbursement of the application fee paid by the rights owner to the Tribunal; and
- [d] \$250.00 under r.12(2)(d), being an additional deterrent sum.

Decision of the Copyright Tribunal delivered by Jane Glover

**DATED** at WELLINGTON this 4th day of September 2013

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Jane Glover